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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 353

SEAGRAM-DISTILLERS CORPORATION,
Petitioner,

vs.

NEW CUT RATE LIQUORS, INC., et al.,
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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Respondents submit that this Court should deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, reversing the order of the United States District Court for the Northern District of Illinois, Eastern Division. The order of the District Court, which was reversed, granted the Petitioner a permanent injunction in a diversity of citizenship case, involving alleged violations by the defendants of a Fair Trade contract, entered into pursuant to the provisions of the Illinois Fair Trade Act.

QUESTIONS PRESENTED.

Petitioner did not properly present the issues. The issues are:

1. Whether in a diversity of citizenship case, wherein plaintiff is seeking a permanent injunction against defendants for alleged violation of a Fair Trade contract entered into pursuant to the provisions of a State Fair Trade Act, the jurisdictional amount is measured by the value of the sum spent in building good will?

2. Whether plaintiff introduced competent evidence, and carried the burden of proving that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.00?

STATEMENT OF THE CASE.

The statement of the case is adequate except for the following:

1. At page 5 of the petition, it states:

> "Even though plaintiff's wholesale prices were considerably lower than the retail, the decline in plaintiff's sales would obviously have greatly exceeded $3,000."

This statement belongs in the Argument of the Petition, and not in the Statement of the Case.

2. Petitioner's analysis of the decision by the Circuit Court of Appeals is erroneous. The Court of Appeals ruled in substance that—

(a) Defendants' acts did not prevent plaintiff from using its good will in the conduct of its business.

(b) The damage to plaintiff's good will caused or threatened by defendants' acts is the subject of controversy in this case.

(c) Plaintiff has failed to prove any facts by *competent proof* showing what, if any, curtailment of business, and consequent loss, have been or are likely to result from defendants' acts.

(d) It is improper, in the absence of *competent proof*, of the amount of damage sustained or threatened, to look at the evidence of what was spent in building good will and then, if the amount is substantial, to surmise that the amount of the loss is $3,000.00 or more.

(e) The District Court did not note that, when the $3,000 requisite for jurisdiction is challenged in an action brought in a federal court for the protection of a right belonging to plaintiff, there is an important distinction between two classes of diversity cases.

(1) In one class, a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which have injured or damaged, or will injure or damage, a right for which plaintiff seeks protection. In such a case, if plaintiff shows that the alleged injury or damage caused or threatened by a defendant, or by several defendants acting jointly, amounts to at least $3,000, the federal court has jurisdiction.

(2) In the other class of diversity cases, a plaintiff charges wrongful acts by defendant, or by several defendants acting jointly, which, if not prevented, will completely deny or destroy the right for which plaintiff seeks protection. In such a case, if plaintiff shows that the right is worth at least $3,000, the federal court has jurisdiction.

REASONS WHY WRIT OF CERTIORARI SHOULD BE DENIED.

A.

Petitioner's Bases for Granting The Writ:

(1) The Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have held that where the right sought to be protected was plaintiff's trade name, the value of the good will represented by the trade name established the amount in controversy.

(2) The Fair Trade Acts, like the trade name cases, are designed to protect the good will inherent in the trade name. The case of *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, and *KVOS* v. *Associated Press*, 299 U.S. 269, which were adopted and followed by the Circuit Court of Appeals, justified the court in ruling that the evidence as to large amounts spent for advertising, and the volume of sales, established that the good will in plaintiff's trade name far exceeded $3,000 in value; that this was also true as to the value of the right of plaintiff to have its products sold at the stipulated price.

(3) That the decision of the Circuit Court of Appeals is inconsistent even with its own theory, since uncontradicted evidence shows that plaintiff suffered much more than $3,000 in damages from defendants' price cutting; also, that the evidence introduced by plaintiff in this case is far stronger than that held by the First Circuit to be sufficient in *Lee-Wilson* v. *General Electric Co.*, 222 F. 2d 850 (C.A. 1, 1955).

B.

Respondents' Bases for Denying The Writ.

1. (a) and (b) There is a vital distinction between a set of facts wherein the right sought to be protected is plaintiff's trade name, as compared to a set of facts wherein plaintiff charges wrongful acts by a defendant, have injured or damaged, or will injure or damage, a right for which plaintiff seeks protection. When the right sought to be protected is plaintiff's trade name, defendant's wrongful acts may completely deny or destroy the right for which plaintiff seeks protection; consequently, the courts have properly ruled that under such circumstances the business reputation or good will attached to the trade name is an intangible asset to be taken into consideration in ascertaining the value of the right to be protected. However, in the instance of alleged violation of a Fair Trade contract executed pursuant to the provisions of a State Fair Trade Act, the right sought by plaintiff to be protected is the right of plaintiff to have its products sold at the stipulated price. It is this right which Petitioner requested the lower courts to protect. The value of this right can be measured only by the loss, if any, which would follow as a result of defendants' failure to sell plaintiff's products at the stipulated Fair Trade prices. Defendants' acts did not prevent plaintiff from using its good will in the conduct of its business; whereas, in the instance of a plaintiff's desire to protect the right to use its trade name, plaintiff is directly prevented from using its good will in the conduct of its business. *McNutt* v. *General Motors Acceptance Corp., supra,* and *KVOS* v. *Associated Press, supra.*

2. Petitioner attempts to reconcile the *McNutt* and *KVOS* cases, *supra,* with this case, and on page 14 of its Petition, states:

> "*But in those cases* [McNutt & KVOS], *plaintiff proved the value of the wrong right.*" (Italics supplied by Petitioner) (Words in brackets supplied.)

At page 15, Petitioner continues:

> "Here plaintiff's evidence as to large amounts spent for advertising and the volume of sales—even apart from but certainly in combination with the evidence that retailers would take Seagram's products 'off the shelf' and that sales would be substantially curtailed—established that the good will in plaintiff's trade names far exceeded $3,000 in value, and also that this was true as to the value of the right of plaintiff to have its products sold at the stipulated prices."

It is obvious from Petitioner's argument that *it also attempts to prove the wrong right.* Respondents have no argument with Petitioner that the good will of plaintiff's brand names far exceeds $3,000 in value; but defendants' acts did not prevent plaintiff from using its good will in the conduct of its business; consequently, the good will in Petitioner's brand names is not the subject of controversy. The subject of controversy in this case is the damage to Petitioner's good will caused or threatened by defendants, as a result of the defendants' refusal to sell plaintiff's products at the stipulated Fair Trade prices. *McNutt* v. *General Motors Acceptance Corp., supra,* and *KVOS* v. *Associated Press, supra.*

3. Petitioner contends that the court failed to construe all of the evidence bearing upon the jurisdictional amount and erred in reversing the District Court's finding of fact that the amount in controversy exceeds $3,000, exclusive of interest and costs.

(a) In support of its position, Petitioner sets forth certain testimony given by Teece (Pet., p. 16) and Lind

(Pet., p. 17). Petitioner, however, failed to state that Teece and Lind were both permitted to give this testimony over the objections of the defendants (I.R. 84) (I.R. 101). Defendants contended this testimony was not competent. These witnesses were asked to testify to ultimate conclusions which could only be drawn by the District Judge in determining the jurisdictional issue in this case, based upon competent evidence. *Hairgrove* v. *City of Jacksonville,* 366 Ill. 163, 182. In addition, the questions of Petitioner's counsel called for speculation, conjecture, and surmise. We submit that the testimony of Teece and Lind, referred to by Petitioner, was not competent to prove the jurisdictional issue. In *McNutt* v. *General Motors Acceptance Corp., supra,* the court at page 189 stated:

> "The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by *competent proof.*" (Italics supplied.)

(b) The principles of law set forth in *Lee-Wilson* v. *General Electric Co., supra,* which is cited by Petitioner as authority for the acceptance of the type of evidence which was introduced in this case, do not apply, because in the *Lee-Wilson* case the issuance of a preliminary injunction was involved; whereas, in this case the issuance of a permanent injunction is involved. At page 853 of the *Lee-Wilson* case, the court said:

> "* * * the district court * * * heard and denied the motion to dismiss prior to issuing the temporary injunction. At such hearing, both the plaintiff and the defendant were content to rest upon the verified bill

and the motion. As above pointed out, the plaintiff at that stage had made a sufficient showing to justify the district court in holding on to the case and issuing the temporary injunction. If the district court, in setting down the motion for hearing, had indicated that that was to be a final full-dress hearing on all issues of fact or law bearing on the existence of the jurisdictional amount, the parties would have had then a last chance to produce all the evidence they had bearing on the jurisdictional issue. In the present case we do not gather that the hearing on the motion to dismiss was of this nature; hence, at some future point in the proceeding, perhaps at the final hearing, if the defendant's answer denies the truth of the formal allegation of jurisdictional amount and of the further allegations of the complaint in support thereof, this issue may again be before the court for determination, with another opportunity afforded to the parties to introduce competent evidence on this issue. But of course the burden of proof will remain upon the plaintiff."

It is obvious from the above that the *Lee-Wilson* case has no bearing whatsoever on this case.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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